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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEB - 9 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Parts 1, 21 and 74)
to Enable Multipoint Distribution)
Service and Instructional)
Television Fixed Service)
Licensees to Engage in Fixed)
Two-Way Transmissions)

MM Docket No. 97-217
File No. RM-9060

To: The Commission

REPLY COMMENTS OF HITN

The Hispanic Information and Telecommunications Network ("HITN") hereby respectfully submits the following comments in reply to the comments of other parties filed in response to the Commission's Notice of Proposed Rulemaking, FCC 97-360, released October 10, 1997, in the above-captioned proceeding.

In their comments, the National ITFS Association ("NIA") and the Wireless Cable Association ("WCA") have proposed the adoption of principles contained in a "Joint Position" which they recommended that the Commission incorporate into any new rules which emerge from this proceeding. HITN supports the Joint Position to the extent the concepts recommended therein would serve to facilitate the ability of ITFS licensees to utilize their spectrum for two-way, flexible uses. However, HITN strongly opposes the

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Joint Position insofar as it might be read to suggest that ITFS licensees currently obligated under excess capacity lease agreements with wireless cable operators should by virtue of FCC rules and policies have less than full 100% control and responsibility over their licensed spectrum.

As HITN explained in its Comments, ITFS operators have a fundamental non-delegatable license responsibility for the operation and use of their systems notwithstanding any lease agreement with respect to any use of system capacity. To the extent capacity has been leased to a wireless cable operator for the provision of one-way video programming services, questions of contract interpretation should not be resolved explicitly or implicitly through the FCC rulemaking process. See HITN Comments at 6-9. HITN is concerned that Sections I-III of the Joint Position could be misconstrued to mean that an ITFS licensee who currently leases a portion of its spectrum to a wireless cable operator is entitled only to the use of 5% of its overall spectrum to meet minimum programming requirements, while the remaining 95% would be considered "excess capacity" and pass to the wireless cable operator for its flexible use in the provision of new two-way services. HITN made clear in its Comments that the Commission must ensure that the maximum amount of spectrum an ITFS licensee is entitled to under an existing lease agreement in any new environment which emerges at the termination of this proceeding is a matter of

contract law and is in no way tied to rules regarding minimum programming requirements.

Therefore, in order to clarify the interaction between the regulatory and contractual questions involved, HITN strongly urges that the Commission adopt the following principles as part of the rules which are adopted in this proceeding.

(a) The construction of existing agreements is a matter of contract law and, unless otherwise expressly provided for in the lease, such leases shall not be construed by virtue of any reference to, or reliance upon, Commission minimum programming requirements to mean that an ITFS licensee shall lease excess capacity in any new digitally operated ITFS system beyond the comparable proportion of leased bandwidth (assuming the full exercise of recapture rights) to overall ITFS system capacity under any existing lease for an analog system.

(b) As existing excess capacity leasing has been previously authorized only to stimulate the development of one-way wireless cable video programming services, unless expressly provided for in the lease agreement, the use of ITFS capacity leased under an existing lease agreement to an MDS operator shall be limited to the delivery of one-way video programming service.

HITN's Comments provide additional reasoning for the adoption of these provisions. See Comments of HITN at 5-9, 15-17. Only with these clarifications will ITFS licensees be sufficiently protected against attempts by wireless cable operators, who hold a substantially stronger negotiating position, to hoard the spectrum of ITFS licensees and obtain sure windfalls in the new two-way digital world.

In their comments, WCA overall appears to suggest that the Commission should write new rules which permit MDS

operators the flexibility to take substantial ITFS spectrum from ITFS licensees under current "excess capacity" lease agreements and utilize it to construct new commercial digital wireless communications services systems used to provide two-way voice, video and data from which they will gain substantial economic benefit.¹ HITN strongly disagrees with what appears to be WCA's suggestion that because ITFS licensees depend on MDS operators for financial assistance, the MDS operators should be permitted to have their way with ITFS spectrum under excess capacity lease agreements. The Commission must protect ITFS licensees against the potential for spectrum hoarding by MDS operators by carefully drafting rules such as those proposed above. Numerous ITFS licensees, including HITN, have plans to fully utilize their spectrum autonomous of MDS operators to provide educational telecommunications services, and do not plan to rely on MDS operators for financial assistance.

HITN also disagrees with WCA's proposal to amend Section 74.931 of the Commission's Rules to mandate that an ITFS licensee has the "right" to recapture only up to 25% of its overall system capacity for educational use. Comments of WCA at 137-141. As HITN stated in its Comments, an ITFS licensee subject to an excess capacity lease agreement has full control and responsibility over its spectrum and has the right to retain and/or recapture all of its spectrum to provide educational services (up to 100% of its spectrum)

¹ See Comments of WCA at 132-136.

unless clearly defined terms in a lease agreement dictate otherwise. The Commission should make clear that it is not an ITFS licensee's "right to negotiate to retain access to as much capacity as its desires," as WCA suggests,² but rather it is the privilege of the MDS operator to have the ability to "negotiate" a lease of any excess capacity which an ITFS licensee does not plan to utilize.

HITN strongly urges the Commission to ensure that MDS operators will not have the ability to tangle and tie up ITFS spectrum by shifting educational services onto channels outside the ITFS system without express permission from the ITFS licensee under a lease agreement or otherwise. ITFS licensees should have the complete ability to recover a contiguous block of spectrum notwithstanding the number of licensed channels, either by recapturing spectrum during an existing lease term, or by reclaiming the spectrum at the expiration of a lease term. In this respect, HITN is highly concerned with the suggestion of WCA that "ITFS licensees in a market will all lose some degree of autonomy when their channels are combined into an advanced system, and may find it impossible to return to their pre-lease configuration upon termination of the lease." Comments of WCA at 151. The Commission must create rules which protect ITFS licensees from the likelihood that an MDS operator will construct an advanced system using ITFS frequencies and be

² Id. at 139.

in a position to hoard the spectrum during the lease term or at the termination of the lease term, leaving the ITFS licensee with no spectrum or undesirable non-contiguous pieces of spectrum.

HITN also strongly disagrees with the suggestions of WCA that excess capacity leases should contain provisions requiring that: (1) the remaining lease obligations be assigned along with the assignment of the ITFS license; and (2) an ITFS licensee should be forced to assign its license to another ITFS eligible located by the MDS operator leasing its ITFS spectrum prior to canceling its FCC license. See Comments of WCA at 158. These suggestions again exemplify the wireless cable operators' attempts to take control of ITFS spectrum away from Commission ITFS licensees for their own commercial uses. For substantial public policy reasons, the Commission has refused to allow MDS operators simply to appropriate ITFS spectrum and has refused to allow these provisions in lease agreements. HITN requests that the Commission again decline to allow any such provisions to protect the autonomy of ITFS licensees.

Conclusion

HITN respectfully requests that the Commission carefully consider the foregoing reply comments before making any final determinations in this proceeding regarding the future of ITFS.

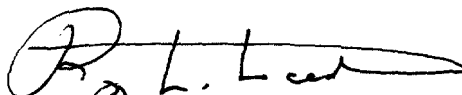
Respectfully submitted,

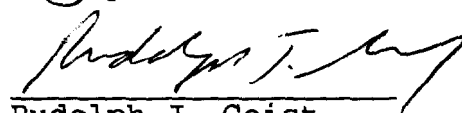
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